

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHERMAN SMALLWOOD,

Plaintiff,

vs.

Civil Action 2:08-CV-679
Judge Sargus
Magistrate Judge King

TERRY COLLINS, Director, Ohio
Department of Rehabilitation
and Corrections, et al.,

Defendants.

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner, filed this action under 42 U.S.C. §1983 alleging that his constitutional rights were violated in connection with parole proceedings and statutes. Plaintiff initially sought leave to proceed *in forma pauperis* on July 15, 2008, but that request was denied and plaintiff thereafter paid the full filing fee. The complaint was filed July 18, 2008. Summonses were issued by the Clerk, Doc. No. 4, and plaintiff apparently attempted to effect service of process by personally mailing a copy of the complaint and summons to each named defendant by certified mail. See *Affidavit of Plaintiff*, Doc. No. 6. This matter is now before the Court on the motion to dismiss for failure to effect proper service of process within 120 days after the filing of the complaint. Doc. No. 8.

The memorandum in support of the motion to dismiss notes, correctly, that the attempted service of process was insufficient.

In his response, plaintiff insists that the procedures followed by him conformed with Ohio R. Civ. P. 4.1.

Under the Federal Rules of Civil Procedure, service of process may be made in accordance with state law. F.R. Civ. P. 4(e)(1). The Ohio rules governing service of process by certified mail, Ohio R. Civ. P. 4.1(1), require that service by certified mail be made -- not by the litigant -- but by the Clerk. *Id.* Service by certified mail in this

Court is governed by S.D. Ohio Civ. R. 4.2, which also contemplates service of process by the Clerk of this Court. S.D. Ohio Civ. R. 4.2. Plaintiff's attempted service of process complied with neither Ohio law nor the rules of this Court. That service was therefore insufficient to bring the defendants before this Court.

Rule 4(m) of the Federal Rules of Civil Procedure requires that claims against any parties not served within 120 days be dismissed without prejudice unless good cause is shown for the failure to make timely service of process. Because plaintiff, who is proceeding without the assistance of counsel, was apparently unaware of the proper method of effective service of process in this action, the Court concludes that a brief extension of time by which plaintiff may serve the defendants is warranted.

It is therefore **RECOMMENDED** that the motion to dismiss, Doc. No. 8, be **DENIED** without prejudice to renewal should plaintiff not effect proper service of process, consistent with S.D. Ohio Civ. R. 4.2, within 30 days of the date of this Order.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within ten (10) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers*,

Local 231 etc., 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*,
638 F.2d 947 (6th Cir. 1981).

December 2, 2008

s/Norah McCann King
Norah M'Cann King
United States Magistrate Judge